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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	MM Docket No. 92-264
Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992	)	

REPLY OF TIME WARNER ENTERTAINMENT COMPANY, L.P.
TO VIACOM INTERNATIONAL INC.'S COMMENTS ON
PETITION FOR RECONSIDERATION

Time Warner Entertainment Company, L.P. ("TWE"), by its attorneys, and pursuant to Section 1.429(g) of the Commission's rules, respectfully submits this Reply to Viacom International Inc.'s ("Viacom") Comments on the Center for Media Education and the Consumer Federation of America's ("CME/CFA") Petition for Reconsideration ("Viacom Comments") of the Commission's Second Report and Order 1/ in this proceeding. 2/

1/ Second Report and Order, MM Docket No. 92-264, FCC 93-456 (adopted September 23, 1993; released October 22, 1993) ("Second Report and Order").

2/ Comments dated February 9, 1993 and Reply Comments dated May 12, 1993 that were submitted in response to the Commission's initial NPRM are cited by the submitter's name and the designation "I". Comments dated August 23, 1993 and Reply Comments dated September 3, 1993 that were submitted in response to the FNPRM are cited by the submitter's name and the designation "II".

In its Comments, Viacom now argues that the Commission's proposed approach will be "insufficient to prevent the largest cable operators from engaging in anticompetitive practices against programming services". Viacom Comments at i. Viacom took a substantially different position in its earlier submissions in this proceeding. 3/ We believe that Viacom's current position is unsound and should be rejected.

I. SUBSCRIBER LIMITS.

Although Viacom did not address the issue of subscriber limits in its previous comments in this proceeding, it now asserts that the Commission should reduce its subscriber limit of 30% of homes passed to a limit of 15%. 4/ In Viacom's initial comments, however, it stated

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3/ For example, Viacom previously stated that "there is scant evidence, if any, that cable operators have ever favored services with which they are affiliated over unaffiliated program services", Viacom I at 7, n.11 (citations omitted); that must-carry, leased access and PEG channels "increase diversity to consumers and provide alternatives to program services in which the cable operator may have an attributable interest", Viacom Reply I at 7; and that it is "only speculation that cable MSOs will 'dominate the program acquisition market'". Viacom Reply I at 7 (quoting INTV I at 11).

4/ TWE challenged Section 11(c) and various other provision of the 1992 Cable Act and the Cable Communications Policy Act of 1984 ("1984 Cable Act") in the United States District Court for the District of Columbia. Time Warner Entertainment Company, L.P. v. FCC, 835 F. Supp. 1 (D.D.C. September 16, 1993). In its decision, the District Court held that the channel occupancy limits were constitutional

that "the rights to distribute one's own speech and to disseminate the messages of others are both protected by the First Amendment". See Viacom I at 2-3 (citing Lovell v. City of Griffin, 303 U.S. 444, 452 (1938)). As indicated by the District Court in Time Warner Entertainment Company, L.P. v. FCC, 835 F. Supp. 1, 10 (D.D.C. 1993), the subscriber limits raise serious First Amendment problems precisely because they interfere with the right to "distribute one's own speech and disseminate the messages of others". Viacom makes no effort to reconcile its earlier acknowledgment of the constitutional infirmities inherent in the establishment of subscriber limits with its new position which calls for more stringent limits than those adopted.

Like CME/CFA, Viacom asks the Commission to act on

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but that the subscriber limits were not. TWE appealed the decision of the District Court declaring constitutional the provisions of § 11(c) regarding channel occupancy limits and program creation and other provisions of the 1992 Cable Act and the 1984 Cable Act to the United States Court of Appeals for the District of Columbia. Time Warner Entertainment Company, L.P. v. FCC, No. 93-5349 (D.C. Cir. filed November 12, 1993). In the Second Report and Order, the Commission stayed the effective date of the subscriber limit regulations "until final judicial resolution of the District Court's decision". Second Report and Order ¶ 3 and n.5. In addition, TWE filed a Petition for Review in the United States Court of Appeals for the District of columbia of the Commission's regulations that implement Section 11(c) based on the unconstitutionality of the underlying enabling legislation. See Time Warner Entertainment Company, L.P. v. FCC, No. 94,1035 (D.C. Cir. filed January 14, 1994). TWE submits this reply without prejudice to its claims and arguments in those or any related proceedings.

the basis of unproven allegations and to ignore the facts in the record before it. See TWE Opposition at 8-9. Indeed, the Commission did not receive any comments from unaffiliated programmers complaining about discrimination based on affiliation in this proceeding, and Viacom's latest submission should not influence the Commission's determination that a 30% subscriber limit would "balance [the] two competing concerns raised by Congress". Second Report and Order ¶ 25. 5/

Viacom asserts that the Commission established the subscriber limit of 30% of homes passed "without citing specific record evidence" and in heavy reliance on Congress's direction that the "legislation does not imply that any existing company must be divested". Senate Report at 34. But, as the Commission noted, it "considered a number of factors" 6/ and determined that based on "the absence of definitive evidence that existing levels of ownership are sufficient to impede the entry of new video

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5/ Congress directed the Commission to establish regulations that would "balance the concerns expressed about concentration with the efficiencies gained by greater integration". S. Rep. No. 92, 102d Cong., 1st Sess. 34 (1991).

6/ For example, the Commission received evidence from TWE and a number of other commenters that antitrust analysis and marketplace experience supported a 30% to 40% limit. See TWE I at 21-29; TWE Reply II at 3.

programmers", existing arrangements should not be disrupted. Second Report and Order ¶ 27.

Furthermore, Viacom is simply wrong in contending that Viacom International Inc. v. Time Inc., 785 F. Supp. 371 (S.D.N.Y. 1992), requires, or even supports, a subscriber limit below 30%. The Viacom decision addressed a motion for judgment on the pleadings which assumed the truth of the plaintiffs' allegations that (1) the defendant pay television company had monopoly power in an alleged market for pay television programming and (2) the defendant cable company, a sister corporation of the programmer, had monopoly power in local markets for cable television services. Even on those assumptions, the court held that plaintiffs could prevail only if they could substantiate their "allegation that their inability to extend their subscriber base into areas (arguably) controlled" by the defendant pay television company "results in Plaintiffs' being effectively priced out of the national market for pay programming services, and that competition in that market suffers accordingly". Id. at 379. Contrary to Viacom's assertion, the court in Viacom did not hold that a cable operator having less than 10% of all cable subscribers nationally had monopoly power or had violated the antitrust laws. As TWE demonstrated earlier, antitrust analysis amply

supports a subscriber limit of 30% to 40%. See TWE I at 21-24.

Finally, the record in this proceeding contradicts Viacom's argument that a programming service can survive only if it is carried by cable operators having far more than 70% of cable homes passed. As TWE showed in its initial submission, many popular programming services have thrived with penetration levels well below 60% to 70%. TWE I at 27. Further, no programming service can reasonably expect to achieve success overnight; in many instances, including in the case of Viacom's own Nickelodeon service, penetration levels remained below 40% even in its fifth year of operation. Id. at 28. Ultimately, there is no "magic" level of penetration that necessarily assures--or prevents--a programming service's commercial success. Those levels will vary with the economic characteristics and cost structure of the service. Id. at 25. Moreover, non-cable distributors of video programming, including DBS operators such as Hughes and Hubbard and the telephone companies, offer increasingly significant opportunities for programmers.

II. CHANNEL OCCUPANCY LIMITS.

With regard to channel occupancy limits, Viacom suggests that, in the event that the Commission does not

lower the subscriber limit to 15%, it should adopt a 20% channel occupancy limit for those cable operators who reach 15% or more of cable homes passed. In prior submissions, however, Viacom argued that "the channel occupancy limit should be set at 50% or higher in order to provide any plausible argument that the restriction is constitutionally valid". Viacom Reply II at 5 (emphasis added). 7/ Similarly, where Viacom no argues that the subscriber limits should be set "without reference to other sections of the 1984 and 1992 Cable Act", Viacom Comments at 7, it previously urged the Commission to "bear in mind that the channel occupancy limits are but part of a larger Congressionally-mandated scheme to promote competition and diversity". Viacom I at 13-14. And while Viacom now argues that "there is little or no factual support for the argument that leased access is a viable option for programming services that cannot secure carriage", Viacom Comments at 5, it earlier recognized that leased access channels "will provide non-affiliated programmers with the ability to reach

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7/ Ironically, Viacom asserts that the Commission's stay of the subscriber limits further justifies its alternative approach because, in the event that the stay is permanent, cable operators "will be subject only to a 40% channel occupancy limit". Viacom Comments at 18, n. 16. Viacom fails to explain how its proposed 20% channel occupancy limit in conjunction with a 15% subscriber limit would pass constitutional muster in the event that a 30% subscriber limit did not.

consumers". Viacom Reply I at 4.

TWE believes that Viacom's prior positions were correct, and that the Commission should decline to revise its channel occupancy limits.

CONCLUSION

For the foregoing reasons, TWE respectfully submits that the Commission should not adopt the reduced subscriber limits and channel occupancy limits advocated in Viacom's Comments on CME/CFA's Petition for Reconsideration.

February 24, 1994

Respectfully submitted,

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by

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CERTIFICATE OF SERVICE

I, Alida C. Hainkel, do hereby certify that a true copy of the foregoing "REPLY OF TIME WARNER ENTERTAINMENT COMPANY, L.P. TO VIACOM INTERNATIONAL INC.'S COMMENTS ON PETITION FOR RECONSIDERATION" was sent this 24th day of February, 1994, by first class United States mail, postage prepaid, to the following:

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